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MEMBER OF CITY PLANNING COMISSION MAY NOT BE INTERESTED IN PROFITS OF CONTRACT FOR SERVICES WITH CITY, OR ACT AS COMMISSIONER, ARCHITECT, SUPERINTENDENT, OR ENGINEER IN WORK UNDERTAKEN BY CITY, BUT MAY ENTER INTO CONTRACT WITH COUNTY WHEREIN SAID CITY IS LOCATED AND ACT IN ABOVE CAPACITIES IF IT DOES NOT INTERFERE WITH DISCHARGE OF HIS DUTIES—MEMBER OF REGIONAL OR COUNTY PLANNING COMMISSION MAY NOT ENTER INTO CONTRACTS FOR SERVICES OF COMMISSION OF WHICH HE IS A MEMBER, BUT MAY CONTRACT WITH OTHER AGENCIES OF COUNTY OR MUNICIPAL CORPORATIONS—
§§713.22, 733.78, 713.01, 713.21 & 2919.10 R.C.

SYLLABUS:

1. A member of a city planning commission established pursuant to Section 713.01, Revised Code, is an officer of the city within the purview of Sections 733.78 and 2919.10, Revised Code, and may not be interested in the profits of a contract for services with the city, or act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by the city, but such a member is not prohibited from entering into a contract for services with the county in which such city is located, or act as commissioner, architect, etc., in work undertaken or prosecuted by the county, provided that such contract will not interfere with the unbiased discharge of his office.

2. A member of a regional or county planning commission established pursuant to Section 713.21 or Section 713.22, Revised Code, is a public officer and, as such, may not enter into contracts for services with the commission of which he is a member; but may enter into contracts for services with other agencies of the county, or with municipal corporations in the county, provided that such contracts will not interfere with the unbiased discharge of his duty to the public in the discharge of his office.

Columbus, Ohio, January 17, 1962

Hon. Rex Larson, Prosecuting Attorney
Richland County, Mansfield, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“A question has been forwarded to this office by the Board of County Commissioners of Richland County, Ohio, which this

office is advised is of a nature of State-wide interest. This office is advised that due to the nature of the composition of city, regional and county planning commissions that numerous members of such commissions are also architects, contractors, and engineers.

“The question is therefore presented as to whether or not a member of such city, regional or county planning commission is such public official as is prohibited from entering into a contract for services with a municipal or county government in which such commission is located.”

Section 713.01, Revised Code, pertains to *city planning commissions*, reading in pertinent part:

“The legislative authority of each city having a board of park commissioners may establish a city planning commission of seven members, consisting of the mayor, the director of public service, the president of the board of park commissioners, and four citizens of the municipal corporation who shall serve without compensation and shall be appointed by the mayor for terms of six years each, except that the term of two of the members of the first commission shall be for three years.

“The legislative authority of each city without a board of park commissioners may establish a commission of five members, consisting of the mayor, the director of public service, and three citizens of the municipal corporation who shall serve without compensation and shall be appointed by the mayor for a term of six years, except that the term of one of the members of the first commission shall be for four years and one for two years.

“The legislative authority of each city with a commission plan of government, adopted as provided in sections 705.01 to 705.06, inclusive, 705.31, 705.32, and 705.41 to 705.48, inclusive, of the Revised Code, may establish a city planning commission of five members, consisting of the chairman of the legislative authority and four citizens of the city to be appointed by the legislative authority for terms of six years each, except that the term of two of the members of the first planning commission shall be for four years and two for two years. All members of the planning commission shall serve without compensation.

“The legislative authority of each city with a city manager plan of government, adopted as provided in sections 705.01 to 705.06, inclusive, and 705.51 to 705.60, inclusive, of the Revised Code, may establish a commission of five members, consisting of the chairman of the legislative authority, the city manager, and three citizens of the city who shall serve without compensation and shall be appointed by the city manager for terms of six years

each, except that the term of one of the members of the first commission shall be for four years and one for two years.

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Section 713.22, Revised Code, pertains to *county planning commissions*, and reads :

“The board of county commissioners of any county may, and on petition of the planning commissions of a majority of the municipal corporations in the county having such planning commission shall, provide for the organization and maintenance of a county planning commission. Such county planning commission shall consist of eight citizens of the county appointed by the board, together with the members of the board. If the population of any city in the county exceeds fifty per cent of the total population of the county then at least three of the appointive members shall be selected from persons nominated by the planning commission of such city. The appointive members shall be appointed for terms of three years, except that of the eight members first appointed three shall be appointed for terms of two years and two shall be appointed for a term of one year. The members shall serve without pay.

“The county planning commission may employ such engineers, accountants, and other employees as are necessary, and make such purchases as may be needed to the furtherance of its operation.

“The county planning commission may accept, receive and expend funds, grants and services from the federal government or its agencies, from departments, agencies and instrumentalities of state or local government, or from civic sources and contract with respect thereto, and provide such information as may be necessary to secure such financial aid.

“The compensation of such employees and the expenses of the appointive members of the county planning commission shall be paid from appropriations made by the board.”

Section 713.21, Revised Code, pertains to *regional planning commissions*, and reads :

“The planning commission of any municipal corporation or group of municipal corporations, and the board of county commissioners of any county in which such municipal corporation or group of municipal corporations is located or of any adjoining county may cooperate in the creation of a regional planning commission, for any region defined as agreed upon by the planning commissions and boards, exclusive of any territory within the

limits of a municipal corporation not having a planning commission.

“The number of members of such regional planning commission, their method of appointment, and the proportion of the costs of such regional planning to be borne respectively by the various municipal corporations and counties in the region shall be such as is determined by the planning commissions and boards. Such boards and the legislative authorities of such municipal corporations may appropriate their respective shares of such costs. The sums so appropriated shall be paid into the treasury of the county in which the greater portion of the region is located, and shall be paid out on the certificate of the regional planning commission and the warrant of the county auditor of such county for the purposes authorized by section 713.21 to 713.27, inclusive, of the Revised Code. The regional planning commission may accept, receive and expend funds, grants and services from the federal government or its agencies, from departments, agencies and instrumentalities of state or local government, or from civil sources, and contract with respect thereto, and provide such information and reports as may be necessary to secure such financial aid. Within the amounts thus agreed upon and appropriated or otherwise received, the regional planning commission may employ such engineers, accountants, and other employees as are necessary and may rent such space and make such purchases as it deems necessary to its use.”

The main duty of a planning commission is to prepare maps and plans recommending the general location and character of streets, alleys, buildings, bridges, and like subjects (See Sections 713.02, 713.23, 713.24, and 713.25, Revised Code). Planning commissions also have considerable authority in the regulation of platting (See Chapter 711., Revised Code).

It will be noted that a city may be governed by one of four provisions pertaining to city planning commissions (Section 713.01, *supra*). Under all four provisions, however, the planning commission is a part of the city government.

It will be further noted that the mayor and other officers of cities, who may also be members of city planning commissions, are already, by reason of office, precluded from being interested in contracts for services with the respective cities, and from acting as architects, contractors, or engineers in work done for those cities. In this regard, Section 2919.10, Revised Code, reads:

“No officer of a municipal corporation or member of the council thereof or a member of a board of township trustees, shall

be interested in the profits of a contract, job, work, or services for such municipal corporation or township, or act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by such municipal corporation or township during the term for which he was elected or appointed, or for one year thereafter, or become the employee of the contractor of such contract, job, work, or services while in office.

“Whoever violates this section shall forfeit his office and be fined not less than fifty nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both.”

I am also of the opinion that all members of city planning commissions are officers of the cities involved by reason of their membership on such commissions. Although not specifically designated as officers, such members would appear to come within the general definition of “public officer” as found in 44 Ohio Jurisprudence 2d, Section 2, pages 484 and 485, and reading:

“Since one who holds an office is an officer, the term ‘officer’ and ‘office’ are paronymous and, in their original and proper sense, are to be regarded as strictly correlative. In defining a ‘public officer’ therefore, it becomes necessary to define a ‘public office.’ A public office of a civil nature, as defined by the Ohio cases, is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties involving in their performance the exercise of some portion of the sovereign power, and similar definitions by lay and legal lexicographers have been pointed out in the Ohio cases. In legal thinking, an office is an entity and may exist in fact although it is without an incumbent. As a general rule, however, the term ‘office’ embraces the ideas of tenure, duration, emolument, and duties, and in accordance therewith it is said that a public office is the right, authority, and duty created and conferred by law by which for a given period — either fixed by law or enduring at the pleasure of the creating power — an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.”

Members of a city planning commission are appointed pursuant to law for a fixed term, and have specific duties to perform. While such members serve without compensation, it is stated in 44 Ohio Jurisprudence 2d, Section 7, page 494:

“It is now well settled, however, that while emolument is a usual, it is not a necessary, element of a public office.”

Further, without detailing the many duties of a city planning commission relative to platting and planning in the city, I feel it safe to conclude that such a commission is invested with some portions of the sovereign functions of the government and exercises them for the benefit of the public.

Also, in noting the different municipal positions which have in the past been declared to constitute public offices, it would appear to follow that the position of member of a city planning commission should be considered as such. In this regard, it is stated in 38 Ohio Jurisprudence 2d, Section 184, pages 566, 567 and 568:

“Among the officers of a municipality who have been declared public officers are the president of the council or legislative authority, council members, director of public safety, trustees of municipal hospitals, members of boards of health, director of the infirmary board, superintendent of the workhouse, chief of the fire department, members of the board of workhouse directors, board of police commissioners, board of revision, board of public works, trustees of municipal gas works, waterworks trustee, building commissioners, village clerks, village treasurers, members of rapid transit commissions, city engineers, and policemen.”

In view of the foregoing, therefore, I conclude that a member of a city planning commission, as such, is an officer of the city within the purview of Section 2919.10, *supra*, and may not be interested in the profits of a contract, job, work, or services for such city, or act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by the city. Further, such a member would be barred for such activity under Section 733.78, Revised Code, reading in part:

“* * * No member of the legislative authority or of any board and no officer or commissioner of the municipal corporation shall have any interest, other than his fixed compensation, in the expenditure of money on the part of such municipal corporation.
* * *”

For the same reasons above discussed as to members of a municipal planning commission, I am of the opinion that members of either a county or a regional planning commission are public officers. Such members are appointed pursuant to law and are given fixed duties to perform; and, like city planning commissions, the powers and duties of county and regional planning commissions as to platting and planning invest the members of those commissions with a portion of the sovereignty of the state.

A member of a county planning commission is not, of course, a municipal officer; he is a county officer. A member of a regional planning commission is not a municipal officer, and is also not a county officer (Opinion No. 2736, Opinions of the Attorney General for 1958, page 567). Since, Section 2919.10, *supra*, applies only to municipal and township officers, it cannot be applied to members of county or regional planning commissions.

Section 2919.08, Revised Code, is another section of law pertaining to contracts and reads:

“No person, holding an office of trust or profit by election or appointment, or as agent, servant, or employee of such officer or of a board of such officers, shall be interested in a contract for the purchase of property, supplies, or fire insurance for the use of the county, township, municipal corporation, board of education, or a public institution with which he is connected.

“Whoever violates this section shall be imprisoned not less than one nor more than ten years.”

While this section would apply to members of a county planning commission, who are “connected” with the county, and who hold offices of trust, it applies only to contracts for the purchase of property, supplies, or fire insurance, and does not encompass a contract for services such as here concerned. The same can be said for Section 2919.09, Revised Code, reading:

“No person, holding an office of trust or profit, by election or appointment, or as agent, servant, or employee of such officer or of a board of such officers, shall be interested in a contract for the purchase of property, supplies, or fire insurance for the use of the county, township, municipal corporation, board of education, or a public institution with which he is not connected, if the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids advertised as provided by law.

“Whoever violates this section shall be imprisoned not less than one nor more than ten years.”

I have found no other statute which would preclude public officers from entering into contracts as here concerned. However, in 44 Ohio Jurisprudence 2d, Section 76, pages 567, 568, the general rule as to contracts by a public officer is stated as:

“A contract made by a public officer is against public policy and void if it interferes with the unbiased discharge of his duty to

the public in the discharge of his office, or if it places him in a position inconsistent with his duty to the public, or even if it has a tendency to induce him to violate such duty; and the question of the validity of such a contract does not depend on whether it can be shown that the public has actually suffered any detriment or loss."

And in the same volume, Section 77, page 568, it is stated:

"Public policy requires that an agent shall not deal with or for himself, directly or indirectly, and all such contracts made by an agent are voidable as against his principal. This salutary principle of the law applies as well to public as to private agents; and public officials, who are agents of the public, will not be permitted to put themselves in a position antagonistic to the public interests, which they represent and which it is their duty to protect, and will not be permitted to derive any personal or pecuniary advantage or interest from the transaction."

Under the above noted general rule I have no doubt that a member of a municipal, county or regional planning commission would be barred from contracting with the commission to perform services for the commission. In such a contract the member would be dealing with himself. But the rule is not so easily applicable where, as to a member of the county or regional planning commission, the contract for services is not with the planning commission but is with another agency of the county, or is with a municipal corporation in the county. Also, a question might arise where, as to a member of a municipal planning commission, the contract is with the county.

It might be possible that because of some power or duty of the planning commission the member would be in a position to promote his self-interest in contracting for services with another agency of the county, or with a municipal corporation in the county. Because of the varied duties of planning commissions as to plans for streets, alleys, ways, etc. (Sections 713.01, 713.23, Revised Code), and as to plats (Chapter 711., Revised Code), I recognize such possibility. However, whether contracts in such cases would be barred because of conflicts of interests on the part of members of the commissions, would depend on the specific facts of each case.

I conclude, therefore, that a member of a county or a regional planning commission may enter into a contract for services with another agency of the county, or with a municipal corporation in the county, and a member of a municipal planning commission may enter into a contract for services with

the county, provided that such contract will not interfere with the unbiased discharge of his duty to the public in the discharge of his office.

In conclusion, it is my opinion and you are advised :

1. A member of a city planning commission established pursuant to Section 713.01, Revised Code, is an officer of the city within the purview of Sections 733.78 and 2919.10, Revised Code, and may not be interested in the profits of a contract for services with the city, or act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by the city, but such a member is not prohibited from entering into a contract for services with the county in which such city is located, or act as commissioner, architect, etc., in work undertaken or prosecuted by the county, provided that such contract will not interfere with the unbiased discharge of his duty to the public in the discharge of his office.

2. A member of a regional or county planning commission established pursuant to Section 713.21 or Section 713.22, Revised Code, is a public officer and, as such, may not enter into contracts for services with the commission of which he is a member ; but may enter into contracts for services with other agencies of the county, or with municipal corporations in the county, provided that such contracts will not interfere with the unbiased discharge of his duty to the public in the discharge of his office.

Respectfully,

MARK MCELROY

Attorney General